(iii) The State Public Service Commission contributed to the delay by not communicating the decision to dismiss him as soon as possible but only after 13 days later and further, the actual date of the decision was not divulged to him until six months had lapsed.

With regard to the second issue, I am of the view that when the appeal was pending before the Supreme Court, the applicant could not be expected to apply for an extension of time because the applicant was then still contending that he was within time. The Supreme Court made its decision on 20 November 1989 and the present application was filed 18 days later. In my view, the 18-day delay is not inordinate. Nothing should be construed against the applicant for not applying for stay of execution of the decision of Haidar J because, to my mind, an application for stay of execution is not imperative in every case of appeal and further, on the facts, there was no necessity for the applicant to apply for stay of execution as he was not threatened with execution of any sort. Therefore, this ground also has no merit.

In the case of ground (c), the learned deputy contended that an oral application for extension of time was made before Haidar J but was refused on the ground that it was not made in proper manner. Therefore, as the matter had been decided by another judge of equal jurisdiction, this court is functus officio. With due respect, such contention is untenable having regard to the record of proceedings before Haidar J. It is manifestly evident from the judgment that the oral application for extension of time was not entertained by Haidar J and the issue of delay, including the applicant's explanation for the delay, was never canvassed before the court. In other words, Haidar J did not consider the issue of delay at all.

With regard to ground (d), the learned deputy contended that as the appeal against Haidar J's decision (which, inter alia, refused the applicant's application for extension of time) had been dismissed by the Supreme Court, this court is estopped from hearing the present application on the principle of res judicata. With due respect, this contention is also untenable having regard to the record of proceedings before the Supreme Court. It is evidently clear that there was no appeal touching the extension of time, nor was the issue of extension of time raised before the Supreme Court and nor was it in the memorandum of appeal. The Supreme Court merely decided on the construction of the words '... within 6 weeks after the date of the proceeding ...' in O 53 r 1A, based on the facts of the case. Having regard to the circumstances of the case, I conclude that the following conditions for an estoppel to arise upon res judicata have not been fulfilled (per Lord Hanworth MR in *Commissioners of Inland Revenue* v *Sneath*[3] at p 380):

> There must be a lis inter partes in which the point relied upon for establishing the estoppel was not merely incidentally, or collaterally, discussed and litigated, but was fundamental to the conclusion reached by the court.

Per Lord Justice Morris in *Society of Medical Officers of Health* v *Hope*[4] at p 481 quoting the passage from the judgment of Chief Justice De Grey in *Duchess of Kingston*'s case:[5]

> But neither the judgment of a concurrent or exclusive jurisdiction is evidence (that is, as I understand the meaning of the Chief Justice, conclusive evidence) 'of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognisable, nor of any matter to be inferred by argument from the judgment'.

In the circumstances and for the aforesaid reasons, the earlier order that I made in chambers is hereby affirmed, ie the application for leave to apply for certiorari must be filed within four weeks from today. Costs are to be in the cause.

Application allowed.

Solicitors: *Thomas & Co.*

Reported by *Zarinah Marican*

Senator Lau Keng Siong & Anor v Ng Cheng Kiat

HIGH COURT (MUAR) — CIVIL SUIT NO 22-23 OF 1990
RICHARD TALALLA JC
4 JULY 1990

Civil Procedure — Injunction — Plaintiffs attempting to restrain political party from holding general assembly elections — Injunction to restrain party from expelling or suspending the plaintiffs until final determination of suit — Domestic remedies not exhausted — Balance of convenience — Quia timet — No evidence of threatened wrong

Administrative Law — Ouster clauses — Jurisdiction — Whether decision to suspend elections within jurisdiction of steering committee and Presidential Council of association — Societies Act 1966, s 18C

Societies — Finality of political party's decisions — Power and authority of association to suspend elections — Plaintiff not having exhausted domestic remedies before taking disputes to court — Societies Act 1966, s 18C

Civil Procedure — Mandatory injunction — Order to be precisely worded — Nature and extent of problem not known — Court not able to supervise compliance of mandatory injunction

The first plaintiff is a life member of the Malaysian Chinese Association ('the association'), chairman of its Muar division and chairman of a branch of the association which falls under the Muar division. He is also a senator. The defendant is the secretary-general of the association which is a political party registered

under the Societies Act 1966. The central committee of the association had set a timetable for the association's elections. The branch elections were to be held on 20, 21 or 22 April 1990; divisional elections on 18, 19 or 20 May 1990 and general elections on 28 and 29 July 1990.

The first plaintiff discovered in March that there were fictitious members in six branches of the Muar division. He complained of this to the steering committee which was set up to conduct and supervise the elections. The steering committee decided to set up an investigation team to look into the complaints, which investigations have yet to be completed at the time these applications were heard. The steering committee later decided to suspend the Muar division elections until a thorough investigation into the complaints had been completed. The plaintiff as chairman of the Muar division election steering committee then sent a letter to the steering committee giving the latter seven days to take over the election of the Muar division and to immediately conduct elections. There was no reply to the letter.

The plaintiffs claim, inter alia, a declaration that the suspension decision is null and void, an order that the defendant and the association forthwith take over the conduct of the divisional elections, an injunction to restrain the defendant from conducting elections at the annual general assembly and an injunction to restrain the defendant and the association from expelling or suspending the plaintiffs from the association until the final determination of this suit.

Held, dismissing the plaintiffs' applications:

(1) When the decision to suspend the Muar divisional elections was communicated to the plaintiffs, the plaintiffs did not avail themselves of their right to be heard in answer thereto, as provided for in arts 174 and 175 of the association's constitution. The proper course for the plaintiffs to have taken was under art 175, which provides that no member shall take any party matters to court until he has exhausted all possible avenues or remedies provided by the provisions of the constitution. Instead, the first plaintiff gave the seven-day ultimatum to the steering committee; by taking this course the plaintiffs forfeited any right they may have had of being heard in regard to the decision to suspend the election in question.

(2) The decision to suspend the divisional elections was not directed at and did not affect the plaintiffs exclusively. They had not been expelled from the association without being given a chance to be heard. The decision affected all the members of the Muar division and its branches and in the circumstances, it would have been unreasonable to have expected notice of hearing to be given to all those affected by the decision. It is all the more so that a person who felt aggrieved by the decision should have taken steps under art 175.

(3) The decision to suspend the Muar divisional elections was within the power and authority of the steering committee and the Presidential Council which upheld the decision. The decision was incident to the administration of the affairs of the association.

(4) The first plaintiff had an automatic right by virtue of art 33.3 to stand in the Central Committee elections at the annual general assembly as he is the chairman of a division and a Member of Parliament. The suspension did not therefore prevent him from standing in the annual general assembly elections.

(5) The plaintiffs have a prima facie right as members of the association to have the Muar divisional elections conducted before the general assembly elections, which in the absence of anything else they should be able to enforce. But this right is not enjoyed in isolation but is intertwined with the rights of all members of the branches under the Muar division. None of these other members have complained about the suspension decision but instead are represented by the defendant and must be taken impliedly to support the defendant's stand.

(6) The elections to be held at the general assembly will determine the leadership of the association and would have a bearing on the nation's general elections when held. The association must hold its elections in the interest of its members, to be in readiness with an up-to-date representation and leadership, for the general elections. This has to be weighed against the individual aspirations of the plaintiffs at the divisional level in Muar. The balance of convenience must come down heavily in favour of the defendant in his capacity as representative of all the members of the association, save the plaintiffs.

(7) As to the quia timet injunction, there is no evidence of threatened wrong. The first plaintiff has merely affirmed that he honestly believes that the association will resort to harassment and intimidation without stating the grounds of his belief as required under O 41 r 5(2) of the Rules of the High Court 1980. A plaintiff complaining of threatened invasion of a legal right must establish not only that there is such a right, but that that right has been infringed, that further infringement is threatened to a material extent, and in respect of damage which the plaintiff has not suffered as yet, that it is likely to accrue within a reasonable time. There must be proof of imminent danger, if no actual damage is proved, and there must be proof that the apprehended damage will, if it comes, be very substantial. In this case, all that the first plaintiff has effectively said is 'timeo', which is not sufficient.

(8) A mandatory injunction is given only in rare circumstances and if the court is able to tell the person against whom the injunction is sought, exactly what it had to do in order to comply with it. In this case, the court does not know the magnitude or extent of the problem in regard to fictitious persons in the membership register, or what can be done to resolve the problems. There is no way that the court can supervise the effective working out of the mandatory injunction if it is given.

(9) The court has no jurisdiction to deal with the alternative injunction sought, to restrain the holding of the elections at the general assembly, by virtue of s 18C of the Societies Act 1966. The plaintiffs themselves have not questioned the validity of the decision to hold those elections.

[Bahasa Malaysia summary

Plaintif pertama ialah ahli seumur hidup Persatuan Cina Malaysia ('persatuan itu'), pengerusi bahagian Muarnya dan pengerusi satu cawangan persatuan itu yang termasuk di bawah bahagian Muar. Beliau juga seorang senator. Defendan adalah setiausaha agung persatuan itu yang juga sebuah parti politik yang didaftarkan di bawah Akta Pertubuhan 1966. Jawatankuasa pusat persatuan telah menetapkan suatu jadual waktu untuk pilihanraya persatuan itu. Pilihanraya cawangan juga akan diadakan pada 20, 21 atau 22 April 1990; pilihanraya bahagian pada 18, 19 atau 20 Mei 1990 dan pilihanraya umum pada 28 dan 29 Julai 1990.

Plaintif pertama memergoki dalam bulan Mach bahawa terdapat ahli-ahli khayalan di enam cawangan bahagian Muar. Dia mengadu perkara ini kepada jawatankuasa pengemudi yang ditubuhkan bagi mengendali dan mengawasi pilihanraya itu. Jawatankuasa pengemudi membuat keputusan menubuhkan suatu kumpulan penyiasat untuk mengkaji ke dalam aduan itu, di mana siasatannya belum lagi selesai ketika permohonan ini didengar. Kemudiannya, jawatankuasa pengemudi mengambil

keputusan menggantung pilihanraya itu sehingga suatu siasatan mendalam ke dalam aduan-aduan itu diselesaikan. Plaintif sebagai pengerusi jawatankuasa pengemudi bahagian Muar kemudiannya menghantar sepucuk surat kepada jawatankuasa pengemudi memberi jawatankuasa pengemudi tujuh hari untuk mengambil alih pilihanraya bahagian Muar dan dengan serta-mertanya mengendalikan pilihanraya. Tidak ada jawapan kepada surat tersebut.

Plaintif menuntut antara lainnya, suatu deklarasi bahawa keputusan penggantungan itu adalah batal dan tak sah, suatu perintah supaya defendan dan persatuan itu dengan serta-merta mengambil alih pengendalian pilihanraya bahagian, suatu injunksi bagi menghalang defendan daripada mengendali pilihanraya di perhimpunan agung tahunan dan suatu injunksi bagi menghalang defendan dan persatuan itu daripada membuang atau menggantung plaintif daripada persatuan itu sehingga penyelesaian muktamad tindakan ini.

Diputuskan, menolak permohonan plaintif:

(1) Apabila keputusan menggantung pilihanraya bahagian Muar diberitahu kepada plaintif, plaintif tidak menggunakan hak mereka untuk didengar sebagai jawapan kepadanya itu, seperti diperuntukkan dalam perkara 174 dan 175 perlembagaan persatuan itu. Langkah yang sepatutnya diambil oleh plaintif ialah di bawah perkara 175, yang memperuntukkan bahawa tidak ada ahli boleh membawa hal-hal parti ke mahkamah sehingga dia telah menghabiskan segala jalan atau remedi yang mungkin ada seperti diperuntukkan oleh peruntukan Perlembagaan. Sebaliknya, plaintif pertama memberi tujuh hari yang terakhir kepada jawatankuasa pengemudi; dengan mengambil jalan ini plaintif telah lucuthak sebarang hak yang mereka mungkin ada untuk didengan berkenaaan dengan keputusan menggantung pilihanraya yang dipersoalkan itu.

(2) Keputusan untuk menggantung tidak diarahkah kepada dan tidak mengganggu plaintif secara khas sahaja. Mereka tidak dibuang daripada persatuan itu tanpa diberi peluang untuk didengar. Keputusan itu mengganggu semua ahli bahagian Muar dan cawangan-cawangannya dan dalam keadaan ini, adalah tidak munasabah memerlukan notis perbicaraan diberi kepada semua yang terganggu oleh keputusan itu. Adalah lebih patutnya sesiapa yang terkilan oleh keputusan itu mengambil langkah di bawah perkara 175.

(3) Keputusan menggantung pilihanraya bahagian Muar adalah di dalam daya dan kuasa jawatankuasa pengemudi dan Majlis Presiden yang telah mengesahkan keputusan itu. Keputusan itu adalah berkaitan dengan pentadbiran urusan persatuan itu.

(4) Plaintif pertama mempunyai hak secara spontan melalui perkara 33.3 untuk bertanding dalam pilihanraya Jawatankuasa Pusat di perhimpunan agung tahunan sebab dia adalah pengerusi bahagian dan seorang Ahli Parlimen. Oleh itu, penggantungan itu tidak menghalangnya daripada bertanding dalam pilihanraya itu.

(5) Plaintif juga mempunyai hak prima facie sebagai ahli persatuan itu untuk mengadakan pilihanraya bahagian Muar dikendalikan sebelum perhimpunan agung, di mana tanpa wujudnya perkara-perkara lain, mereka berkemampuan menguatkuasakannya. Namun begitu, hak ini tidak dinikmati secara bersendirian, tetapi saling melilit dengan hak-hak semua ahli-ahli lain cawangan di dalam bahagian Muar. Tidak ada ahli-ahli lain yang mengadu tentang keputusan penggantungan tetapi sebaliknya diwakili oleh defendan dan semestinya dianggap secara tersirat telah menyokong keputusan defendan.

(6) Pilihanraya yang akan diadakan di perhimpunan agung akan menentukan barisan kepimpinan persatuan itu dan juga akan mempengaruhi pilihanraya umum negara bila diadakan. Persatuan itu juga mesti mengadakan pilihanraya atas kepentingan ahli-ahlinya, supaya sedia dengan representasi dan kepimpinan yang menepati masa kini untuk pilihanraya umum. Ini perlu ditimbang dan dititikberatkan daripada aspirasi perseorangan plaintif di tahap bahagian Muar. Imbangan kemudahan semestinya terletak dengan beratnya di sebelah pihak defendan dalam kedudukannya sebagai wakil semua ahli-ahli persatuan itu, melainkan plaintif.

(7) Berkenaan dengan injunksi quia timet, tidak ada keterangan ancaman kesalahan. Plaintif pertama hanya bersumpah bahawa dia dengan ikhlasnya mempercayai bahawa persatuan itu akan menggunakan tindakan ancaman dan gangguan tanpa menyatakan alasan-alasan kepercayaannya seperti dikehendaki di bawah A 41 k 5(2) Kaedah Mahkamah Tinggi 1980. Seseorang plaintif yang mengadu bahawa adanya ancaman perlanggaran hak undang-undang mestilah membuktikan bukan sahaja terdapatnya hak sedemikian, malahan hak itu telah dilanggari dan perlanggaran selanjutnya diancam ke had yang material, dan berkenaan dengan kerosakan yang belum dialami oleh plaintif lagi, ianya mungkin sekali akan dialami dalam suatu tempoh munasabah. Mestilah terdapat bukti bahawa bahaya akan datang tidak lama lagi, walaupun tidak ada kerosakan sebenarnya dibuktikan, dan mestilah adanya bukti bahawa kerosakan yang dijangkakan, jika ia datang, akan sangat substansial. Dalam kes ini, apa yang boleh diperkatakan oleh plaintif secara berkesan ialah 'timeo', dan ini tidak mencukupi.

(8) Suatu injunksi mandatori akan diberi dalam keadaan yang luarbiasa sahaja dan jika mahkamah boleh memberitahu orang terhadap mana injunksi ini dipohon, apa sebenarnya ia mesti lakukan supaya menepatinya. Dalam kes ini, mahkamah tidak tahu betapa besarnya dan kepada had manakah masalah berkenaan dengan orang-orang khayalan dalam daftar keahlian, atau apakah yang boleh dilakukan untuk mengatasi masalah itu. Tidak ada jalan di mana mahkamah boleh mengawasi perlaksanaan secara berkesan injunksi mandatori itu jika ia diberi.

(9) Mahkamah tidak mempunyai bidangkuasa menyentuh tentang injunksi alternatif yang dipohon bagi menghalang pilihanraya diadakan di perhimpunan agung melalui s 18C Akta Pertubuhan 1966. Plaintif sendiri tidak mempersoalkan kesahan keputusan mengadakan pilihanraya tersebut.]

Cases referred to

1 *American Cyanamid Co* v *Ethicon Ltd* [1975] 1 All ER 504 (folld)
2 *Mohamed Zainuddin bin Puteh* v *Yap Chee Seng* [1978] 1 MLJ 40 (folld)
3 *Hubbard* v *Pitt* [1975] 3 All ER 1 (folld)
4 *Hong Kong Vegetable Oil Co Ltd* v *Malin Sirinaga Wicker & Ors* [1978] 2 MLJ 13 (refd)
5 *Ketua Pengarah Kastam* v *Ho Kwan Seng* [1977] 2 MLJ 152 (refd)
6 *Rohana bte Ariffin & Anor* v *Universiti Sains Malaysia* [1989] 1 MLJ 487 (folld)
7 *B Surinder Singh Kanda* v *The Government of the Federation of Malaya* [1962] MLJ 169 (refd)
8 *Chong Kok Lim & Ors* v *Yong Su Hian* [1979] 2 MLJ 11 (refd)
9 *Kok Wee Kiat* v *Chong Hon Nyan* [1985] 2 MLJ 130 (distd)
10 *Tharmalingam* v *Sambanthan* [1961] MLJ 63 (refd)
11 *Ong Boon Seong* v *Syed Hussein Alatas* [1971] 2 MLJ 218 (distd)
12 *Gibb & Co* v *Malaysia Building Society Bhd* [1982] 1 MLJ 271 (distd)
13 *Anisminic Ltd* v *Foreign Compensation Commission & Anor* [1969] 2 AC 147 (refd)

14 *Southeast Asia Fire Bricks Sdn Bhd* v *Non-Metallic Mineral Products Manufacturers Employees Union & Ors* [1980] 2 MLJ 165 (refd)
15 *Re Racal Communications Ltd* [1980] 2 All ER 634 (refd)
16 *Government of Malaysia* v *Lim Kit Siang* [1988] 2 MLJ 12 (refd)
17 *Wong Lok Khiam* v *Dato Peter Lo Su Yin & Ors (No 2)* [1972] 1 MLJ 166 (refd)
18 *Woodford & Anor* v *Smith & Anor* [1970] 1 All ER 1091 (refd)
19 *Lee Liong Chan & Anor* v *Tan Sri Datuk Teh Ewe Lim & Anor* [1985] 2 MLJ 138 (refd)
20 *Fletcher* v *Bealey* (1885) 28 Ch D 688 (folld)
21 *PPES Resorts Sdn Bhd* v *Keruntum Sdn Bhd* [1990] 1 MLJ 436 (folld)
22 *Draper* v *British Optical Association* [1938] 1 All ER 115 (refd)
23 *A-G for the Dominion of Canada & Ors* v *Ritchie Contracting and Supply Co Ltd & Ors* [1919] AC 999 (folld)
24 *Harold Stephen & Co Ltd & Ors* v *Post Office* [1978] 1 All ER 939 (refd)
25 *Redland Bricks Ltd* v *Morris* [1969] 2 All ER 576 (refd)
26 *Sivaperuman* v *Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150 (folld)
27 *Wah Loong (Jelapang) Tin Mine Sdn Bhd* v *Chia Ngen Yiok* [1975] 2 MLJ 109 (refd)

Legislation referred to
Societies Act 1966 s 18C

Yeoh Poh San (*Indrani* (*Ms*) with him) for the plaintiffs.
Darryl SC Goon (*Rajasekaran* with him) for the defendant.

Cur Adv Vult

Richard Talalla JC: The Malaysian Chinese Association ('the association') is a political party registered under the Societies Act 1966. The association is governed by a constitution ('the constitution') consisting of numbered articles. Membership of the association is confined to Malaysian citizens of Chinese descent who are not members of or affiliated to any political party, see art 9. Fifty members may form themselves into a branch in the circumstances set out in arts 92 and 93. The executive authority of a branch is the branch assembly and all executive functions are exercised by the branch committee, see art 95. The branch committee comprises, inter alia, a branch chairman and branch deputy chairman, see art 102. Branches belong to and form part of a division. There is a division established in every Parliamentary electoral constituency and each division is known by the same name as the constituency it is in, see art 65. Each branch elects delegates to the assembly of the division to which it belongs. Under art 94 each branch is entitled to elect three divisional delegates for up to the first 50 members in benefit, one delegate for every 25 members for the next 450 members, one delegate for every 50 members for the next 500 members and one delegate for every 100 members for the remaining members subject to a maximum of 50 divisional delegates. In the same manner, but in varying ratio, each division is entitled to elect delegates to the general assembly, subject to a maximum number of 52 delegates. The general assembly consists of these delegates, Members of Parliament, chairmen of all divisions and others, see art 33. The general assembly is required to meet at least once a year, see art 28. The general assembly also elects to the central committee 20 persons out of the delegates to the general assembly, see art 38.

At this point of time there are 131 divisions and 2,163 branches constituting the association which has a membership of 518,216.

The first plaintiff is a life member of the association, chairman of its Muar division and chairman of the Sultan Ibrahim branch which falls under the Muar division. The first plaintiff is a senator.

The second plaintiff is a delegate from the Sultan Ibrahim branch to the Muar division and is also the secretary of that division.

The defendant is the secretary-general of the association which and whose members he represents in these proceedings. As stated in the indorsement in the writ, he is sued on behalf of all members of the association except the plaintiffs.

Under art 27 the ultimate authority of the party is vested in the general assembly but all executive functions are to be exercised by the central committee. Under art 39 the central committee is the body responsible for the affairs of the association, subject to the authority and direction of the general assembly. Under this same article, the central committee may do all acts, either general or specific on behalf of the general assembly but it must report its activities to the general assembly at the earliest opportunity. Under art 45.2 the central committee is specifically empowered to appoint from time to time such committee or sub-committee as it deems fit to consider and deal with any specific matters.

On 12 November 1989, the central committee established the association's Headquarters Elections Steering Committee ('the steering committee') to conduct and supervise the 1990 party's elections under the chairmanship of the defendant as secretary-general. The steering committee was vested with all powers to conduct and supervise the 1990 party's elections at all levels based on the rules governing the election of office bearers at all levels approved by the central committee. The steering committee was specifically charged with the duty and responsibility of deciding on all matters pertaining to and arising out of the elections, including complaints and interpretation of the election rules.

The central committee set a timetable for the association's elections as follows:

(a) Branch elections on 20 or 21 or 22 April 1990.

(b) Divisional elections on 18 or 19 or 20 May 1990.
(c) General elections on 28 and 29 July 1990.

This timetable was given under the hand of the defendant in his capacity of chairman of the steering committee.

I was informed from the Bar without objection that branch elections under the Muar division have been carried out but not the Muar divisional election.

It is the intention of the first plaintiff to stand for election as a member of the central committee at the election on 28 July.

There are 21 branches constituting the Muar division. On or about 12 March 1990, the first plaintiff discovered that there were fictitious members in six branches of the Muar division. He complained of this to the steering committee and leaders of the association both verbally and in writing, and in his capacity as chairman of the Muar division. Reports were made to the police. The first plaintiff met the defendant and the association's president both of whom, so the first plaintiff affirms, promised to suspend the six offending branches, which were named, leaving the remaining and unaffected branches to proceed to participate and send divisional delegates to the Muar divisional assembly.

The first plaintiff says that between 20 March and 29 May 1990, there were many letters of complaint to the steering committee, the substance of which is as follows. They were from the Bukit Mor branch complaining of irregularities in the conduct of the branch office and elections including the appointment of a Democratic Action Party member as a member of the election steering committee of the branch, from officials of 16 Muar division branches disclosing 'migrated members' in six branches of the division, from the Muar division disclosing 'migrant members' and others phantom and fictitious in six branches of the division, from some 19 individuals protesting that they had never applied to join the association but had been included as members, from the first plaintiff's solicitors to Pengarah Bahagian Kad Pengenalan requesting particulars of registration of 160 persons in respect of which the Pengarah replied showing a number of discrepancies. The first plaintiff claims that there were at least 9 police reports made by different persons complaining that they had never applied to be members of the association, yet their names had been included as members thereof. There was a police report complaining of phantom and fictitious members and a written request to Ketua Police Daerah Muar requesting investigation into phantom members of the association. The first plaintiff as late as 29 May 1990 complained by letter to the steering committee that even Malays had been given Chinese names and enrolled as association members. The first plaintiff claims that a check of the membership list of six of the branches would reveal that 15 persons who never applied to become members have been recruited as such without their knowledge or consent, and another 15 listed as members are phantom and fictitious. Likewise in respect of four more named branches in the division. The first plaintiff also complains that there may be more phantom and fictitious members because clusters of members are registered as having the same address, for example 22 members of one branch are shown as having their address at the office of the chairman of the Bakri division who is also the deputy secretary-general of the association and 157 persons in the same way have a common address, to wit, the office of the chairman of the Bukit Mor branch who is also the deputy chairman of the Muar division. Fifty-six other persons are said to be registered at an address which is non-existent.

The defendant affirms that in the light of the complaints he met the first plaintiff on two separate occasions over the problem. The first plaintiff claims that the defendant and the president, when he met them, promised to suspend the six affected branches and proceed with the Muar divisional elections. The defendant denied this and further affirmed that he was informed by the president and verily believed that whilst the president did meet with the plaintiffs over this matter he never agreed or promised to suspend the six branches as alleged. The defendant did however, by virtue of his position as chairman of the steering committee, undertake that the complaints would be looked into.

On 24 April, the steering committee met at an emergency meeting to consider the complaints and an investigation team headed by the association's national organising secretary, YB Chan Kong Choy was formed to investigate the same. The investigations have still to be completed. The defendant claims that it is a very time consuming task to verify the position in respect of each member.

On 3 May, the steering committee decided to take over the conduct of the Muar divisional elections in view, inter alia, of the pending investigations into the various complaints and by a telegram dated the same day so informed the first plaintiff in his capacity as the chairman of the Muar division. The plaintiffs claim through counsel to have been happy with the steering committee's decision to take over the conduct of the Muar division. This is what the plaintiffs claim they wanted.

By 25 May, as the said investigations progressed it became clear to the defendant that the complaints were possibly as serious as, if not more serious than, were alleged by the plaintiffs and as such the steering committee, in the interest of the party as a whole, decided to suspend the Muar division elections until a thorough investigation into the said complaints had been completed and a proper list of members ascertained and prepared. The plaintiffs were informed of this decision by letter dated 30 May 1990 which was sent to the chairman/

secretary of the Muar division. The plaintiffs were horrified, so their counsel submits, at the steering committee's decision.

On 7 June 1990, the first plaintiff in his capacity as chairman of the Muar division election steering committee sent a letter to the chairman of the steering committee giving the steering committee seven days to take over the election of the Muar division and to immediately conduct election of office bearers and national delegates to the 1990 general assembly. There was no reply to this letter.

The first plaintiff affirmed to the following. First, that unless restrained by an order of court, the association is likely to proceed with its elections at the general assembly on 29 July 1990 to the detriment of the plaintiffs and secondly, to his honest belief that as a result of these problems being created, and the initiation of this civil suit, the association will resort to harrassing, intimidating and interfering in the membership rights, privileges, duties and obligations of the plaintiffs, including expelling the plaintiffs from the association or suspending the plaintiffs' membership and thus making the plaintiffs' struggle futile and this civil suit purely academic unless restrained by this court.

The first plaintiff is prepared to give an undertaking, through his counsel, as to damages in the event that the orders for injunctions are granted. The first plaintiff claims that he has exhausted all domestic remedies available.

It was argued on behalf of the plaintiffs that if the Muar division elections are not held the first plaintiff will lose the right to vote at Muar division level for delegates to the general assembly and apart from that he will also lose the additional support of delegates from the Muar division at the national level elections when he stands for election as a central committee member. As for the second plaintiff, he claims to lose his right to vote at the divisional level and also to stand for election as a delegate to the general assembly.

The first plaintiff claims that the decision to suspend the Muar division elections shows that the association's leadership is biased and that the association is condoning and abetting in the manufacture and creation of phantom members to further the political interest of certain association leaders and to weaken the political strength of honest and dedicated association leaders, wrongful and unconstitutional, that the steering committee did not have the power to suspend the same and that even if it had the powers it did not exercise the same correctly and fairly in the circumstances of the case.

The defendant says that investigations have not been completed and the extent of the problem cannot at this point in time be ascertained. It is categorically denied that the steering committee or the association leadership is biased or is in any way condoning or abetting this problem of fictitious members and indeed all measures are being taken to prevent and to eradicate this abuse. He claims that the decision of the steering committee cannot now be properly challenged in a court of law. It is said that the decision to hold the party elections and the timetable decided on as set out was made by the central committee of the association on or about 12 November 1989.

The plaintiffs commenced this action by way of a generally indorsed writ claiming, inter alia, a declaration that the decision suspending the Muar divisional elections is null and void, an order that the defendant and the association forthwith take over the conduct of the divisional elections and forthwith conduct such elections, an injunction to restrain the defendant and the association from conducting and holding elections at the annual general assembly scheduled to be held on 28 and 29 July 1990 and an injunction to restrain the defendant and the association from expelling or suspending the plaintiffs from the association until the final determination of this suit. At the same time the plaintiffs applied by way of ex parte summons-in-chambers. They were directed to serve it. This was done and the matter argued before me inter partes. The orders sought by way of this interlocutory application were by reference to the relief sought in the writ, a mandatory injunction in terms of the order sought, alternatively an injunction in terms of the first injunction, and pending trial an injunction in terms of the second injunction sought in the writ.

The case of *American Cyanamid Co* v *Ethicon Ltd*[1] was cited. This case is well entrenched in our case law. I respectfully adopt its principles as set out by Hashim Yeop A Sani J, as he then was, in the case of *Mohamed Zainuddin bin Puteh* v *Yap Chee Seng*[2] where the learned judge referred with approval to the case of *Hubbard* v *Pitt*[3] and the principles stated by Lord Denning therein which were to the effect that the first question to be asked is simply whether, in a case such as this where an interlocutory injunction is sought, there is a serious question to be tried in the sense that the claim is not frivolous or vexatious and secondly, if the plaintiffs were to succeed at the trial, whether they would be adequately compensated for the interim continuance of the defendant's activities. Conversely is the question that if the defendants were to succeed at the trial, whether they would be adequately compensated for the interim restriction on their activities which the grant of an interlocutory injunction would have imposed. The judge then considers the balance of convenience, and if the relevant factors were evenly balanced the court should grant an interlocutory injunction which would maintain the status quo. It is said that at that stage the court is not justified in embarking upon conflicting affidavits. In this regard see also *Hong Kong Vegetable Oil Co Ltd* v *Malin Sirinaga Wicker & Ors.*[4]

The plaintiffs complained that they were not given an opportunity to be heard before the decision was made to suspend the Muar divisional elections. Counsel for the plaintiffs cited the case of *Ketua Pengarah Kastam* v *Ho Kwan Seng*[5] at p 154:

> In my opinion, the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled 'judicial', 'quasi-judicial', or 'administrative' or whether or not the enabling statute makes provision for a hearing.

On behalf of the plaintiffs there was also cited the case of *Rohana bte Ariffin & Anor* v *Universiti Sains Malaysia*[6] where Edgar Joseph Jr J said at p 493:

> It is a well-established principle of administrative law that anything that restricts, or appears to restrict, the defendant's ability to present his case may be held to be a breach of procedural fairness and, thereby, susceptible to judicial review; ...

Further cases were cited in support of the plaintiffs' case in this regard. They were *B Surinder Singh Kanda* v *The Government Of The Federation Of Malaya*[7] and *Chong Kok Lim & Ors* v *Yong Su Hian*.[8]

The view I take is that when the decision to suspend the Muar divisional elections was communicated to the plaintiffs the plaintiffs did not avail themselves of their right to be heard in answer thereto. Article 175 reads as follows:

> Notwithstanding any provisions to the contrary herein this Constitution contained, no member shall take any party matters to a court of law until he has exhausted all possible avenues or remedies provided by the provisions of this Constitution.

Article 174 reads as follows:

> In case of any dispute as to the interpretation, construction, rendering or meaning of all or any of the articles of this Constitution or of any Standing Rules and Orders, or of any rules, regulations and bye-laws made thereunder, or of any word or words contained in any such Articles, Standing Rules and Orders, rules, regulations and bye-laws, the interpretation, construction, rendering or meaning determined and fixed by the Central Committee shall be final and conclusive and not subject to question by or in any court of law.

It seems to me that the proper course for the plaintiffs to have taken was under art 175. They did not take any steps thereunder. Instead the first plaintiff gave the seven-day ultimatum to the steering committee to take over the conduct of the Muar divisional elections and to immediately conduct elections of office bearers and national delegates to the 1990 general assembly. The second plaintiff did nothing in this regard. The plaintiffs simply filed this action as the next step. It seems to me that by taking this course the plaintiffs forfeited any right they may have had of being heard in regard to the decision to suspend the election in question. In any event the decision to suspend was not directed at and did not affect the plaintiffs exclusively. It was not as if they were expelled from the association without being given a chance to be heard. The decision was one that affected all the members of the Muar division and its branches and possibly members of other divisions, looking to the Muar division for support. In the circumstances it would be unreasonable to have expected notice of hearing to be given to all persons affected by the decision. It is all the more so that a person who felt aggrieved by the decision should have taken steps under art 175.

The plaintiffs relied heavily on the case of *Kok Wee Kiat* v *Chong Hon Nyan*.[9] That case was heard with three others and the facts were somewhat the same as the facts in this case. The plaintiffs in those four civil suits were also members of the association and sued the association in the name of the secretary-general. They sought interlocutory injunctions to restrain the association from holding certain divisional assemblies for the purposes of electing delegates to its general assembly and from holding elections at the general assembly. The suits arose out of the suspension of the relevant branches affecting the rights of the plaintiffs who claimed wrongful suspension of their respective branches, that the suspension contravened the association's constitution and one of those plaintiffs raised the issue of fictitious members on the register of the association. Wan Hamzah J (as he then was) held that it was not possible on the interpretation of the provisions of the association's constitution to find, as the Court of Appeal did in *Tharmalingam* v *Sambanthan*,[10] that members had undertaken not to have recourse to the court until they had exhausted their domestic remedies, because the constitution purported to completely shut off members from having recourse to the court. The learned judge then referred to four articles of the constitution as follows:

> 130 A member or party affected who is dissatisfied with the decision of the Disciplinary Board may appeal to the Central Committee whose decision shall be final and conclusive.
>
> 131 No member who, or party which has been the subject of any disciplinary action or proceedings shall institute any proceedings in any court of Law:
>
> 131. 1 to go into the legality or propriety or otherwise of any action proceedings and/or decision taken by the President, the Central Committee and/or the Disciplinary Board.
>
> 132. 2 against the Party, its President, the Central Committee, the Disciplinary Board or any member of any action proceedings and/or decision taken by the President, the Central Committee and/or the Disciplinary Board.

The learned judge stated that therefore it was open to the plaintiffs to bring the suits without having recourse to domestic remedies first. His Lordship went on to say that even if it was true that there was a contract on the part of members to exhaust domestic remedies before coming to the court there was justification for them to come to the

court without resorting to domestic remedies first, the reason being that their domestic appeals would be dealt with only after the action complained of and by that time harm would already have come to them and in his opinion if the interlocutory injunctions were not granted and the plaintiffs were successful at the trial they would not be adequately compensated for the loss that they would have sustained as the result of elections being held as planned by association, because they would lose the chance of being elected at divisional assemblies as delegates to the general assembly and they would lose the chance of being elected to the central committee. On the other hand if the interlocutory injunctions were granted and the association were successful at the trial, the loss which the association would have suffered as the result of the elections not being held, would be sufficiently compensated by the award of damages because elections could still be held after the trial, and the loss to the association would probably be only expenses incurred for the preparations already made for the divisional assembly meetings about to be held then, and the plaintiffs were in a financial position to pay the damages. Counsel for the plaintiff also looked for support to the cases of *Ong Boon Seong* v *Syed Hussein Alatas*[11] and *Gibb & Co* v *Malaysia Building Society Bhd.*[12] It is not known whether arts 174 and 175 were available to the judge when *Kok Wee Kiat*'s[9] and the related cases were heard. Certainly the plaintiffs in those cases were not faced with the obstacle which faces the plaintiffs in this case, to wit, the provisions of s 18C of the Societies Act 1966 aforesaid which read as follows:

> The decision of a political party or any person authorised by it or by its constitution or rules or regulations made thereunder on the interpretation of its constitution, rules or regulations or on any matter relating to the affairs of the party shall be final and conclusive and such decision shall not be challenged, appealed against, reviewed, quashed or called in question in any court on any ground, and no court shall have jurisdiction to entertain or determine any suit, application, question or proceeding on any ground regarding the validity of such decision.

The case of *Anisminic Ltd* v *Foreign Compensation Commission & Anor*[13] was cited for the proposition that notwithstanding statutory ouster of the court's jurisdiction, in that case s 4(4) of the Imperial Foreign Compensation Act 1950 which provided that the determination by the foreign compensation commission of any application made under that Act shall not be called in question in any court of law, did not preclude the court from enquiring whether or not the order of the commission was a nullity such as the order being outside the jurisdiction of the commission or where the authority which made the order had acted dishonestly or in mala fide. See the speech of Lord Reid at p 171.

The *Anisminic* case[13] was applied in *South East Asia Fire Bricks Sdn Bhd* v *Non-Metallic Mineral Products Manufacturers Employees Union & Ors.*[14] In that case the Privy Council was dealing with s 29(3)(a) of the Industrial Relations Act 1967 which reads as follows:

> Subject to this Act, an award of the court shall be final and conclusive, and no award shall be challenged, appealed against, reviewed, quashed or called into question in any court of law.

In that case, their Lordships held that if the inferior tribunal had made its decision and the decision was one which it had jurisdiction to make and if that decision was not a nullity for some reason such as breach of the rules of natural justice then the ouster would be effective. See p 167.

Re Racal Communications Ltd[15] was cited and in particular that part of the speech of Lord Diplock at pp 638 to 640. As will appear later in this judgment there seems to be no necessity to delve into the intricacies of that case to decide this application.

Counsel for the defendant submitted that the decision of the steering committee to suspend the Muar divisional election as upheld by the presidential council at its meeting held on 29 May was valid. The presidential council is established under art 46. In art 47 it is stated that without prejudice to the generality of the powers conferred by the constitution, the presidential council shall be the body responsible for the administration of the affairs of the party under the authority and direction of the general assembly and the central committee, that it shall be deemed to have been delegated and sub-delegated by, and vested with all the powers of the general assembly pursuant to art 37.5 thereof and the central committee pursuant to art 45.23. I agree with counsel for the defendant. To my mind the decision to suspend the Muar divisional election was well within the power and authority of the steering committee and the presidential council which upheld the decision. It is true that there is no express provision in the articles for the suspension of a divisional election. The draftsman could not have been expected to provide for every event that might occur in the life span of the association. To have required this of him would to my mind have been to attribute to him the powers of a clairvoyant. Nay, given the circumstances pertaining here, the decision to suspend is in my view an incident to the administration of the affairs of the association.

I had in mind that the plaintiffs were only two members of a body having a membership of more than half a million persons and that it was the defendants who as representative of the association in these proceedings prima facie was speaking for all 518,216 of its members with the exception of the plaintiffs. On the affidavit evidence before me and in view of the undisputedly unfortunate state of the branch registers, I could not see the suspension as being unreasonable. Certainly there did not appear to be any sign of dishonesty, mala fide or any other improper act on the part of the defendant pointing to

breach of the rules of natural justice to the end that the decision to suspend can be said to be a nullity on an application of the principles laid down in the *Anisminic* case.[13] It should be said in passing that the House of Lords in that case was concerned with decisions of administrative tribunals. To my mind that case should apply as much to the decision now under consideration. It was not the defendant who with some sinister motive went looking for ways and means of suspending the Muar divisional election. On the contrary it was the first plaintiff who brought the problem of unlawful membership to the fore. The matter required investigation which would take time. It was considered prudent in the event to suspend the divisional election.

As to the first plaintiff's complaint that the suspension had prevented him from carrying into effect his intention to stand for election to the central committee as a committee member at the 1990 general assembly, there appeared to be no basis for the complaint inasmuch as the first plaintiff had an automatic right by virtue of art 33.3 which provides that the general assembly shall consist of inter alios members of Parliament, a member of Parliament being defined under art 173.5 as a member of either House of Parliament. In fact the first plaintiff has a double qualification to sit in the general assembly which by art 33.5 includes chairmen of all divisions. As stated above he is chairman of the Muar division. As to the first plaintiff's second complaint, to wit, that he has been deprived of his basic rights and privileges which he is entitled to as a life member of the association and that he is deprived of the support of delegates of the Muar division, this complaint is only tenable if it is based upon a legal right enjoyed by the plaintiff as opposed to a political interest. In this regard see *Government of Malaysia* v *Lim Kit Siang*[16] at p 20. The complaint it would appear is based not on a right as such but relates to some political benefit which may come his way at a future time, a matter which at this stage is one of speculation. Yet I do not agree that the plaintiffs have no right as members of the association to have the Muar divisional elections conducted in the normal way that is to say before election at the general assembly or that all they have is some political interest which they may benefit from at a later time, as submitted by counsel for the defendant. In my view they do have such a right. It is a prima facie right which in the absence of anything else they should be able to enforce. However it seems to me that the right of the plaintiffs is one which they enjoy not in isolation such as to be privy as between them respectively and the association. Their right is intertwined with the rights of all other members of the branches coming under the Muar division and indeed with the rights of every member of the association. In this regard there is the case of *Wong Lok Khiam* v *Dato Peter Lo Su Yin & Ors (No 2)*[17] where at p 167 BTH Lee J said:

> Where the question is of an election to an office it is not merely the parties that are interested in it but the members of the association are also interested in seeing that proper persons are put in office to conduct and to control the affairs of the association.

In mind is the fact that other than the plaintiffs none of the half million and more members has complained in these proceedings of the decision to suspend the Muar divisional election. I take into consideration that all these other members as represented by the defendant must be taken not to support the plaintiffs' application but be seen impliedly to be supporting the defendant's stand in the matter.

As to the question of the balance of convenience, counsel for the plaintiffs cited the case of *Woodford & Anor* v *Smith & Anor*[18] where at p 1093 Megarry J said:

> The wrongful deprivation of a right to vote even at a meeting of a mere private association is, in my judgment, no trivial matter. It may not be possible to put any real monetary value on it, any more than it may be possible in the case of a Parliamentary vote (see *Ashby* v *White* (1703) 92 ER 126); but that does not mean that the court must abstain from intervention. If an injunction be refused now, the election can take place without the 57 having an opportunity to take part in or vote at the adjourned annual general meeting, so that by the time this action is heard, unwelcome changes may have taken place in the association which the 57 may be powerless to put right. Leaving the matter until the trial of the action may thus fail to achieve justice.

It may be true that whatever injury or damage the plaintiffs may suffer as a result of the suspension of the Muar divisional elections may be difficult to translate into damage. However that difficulty must apply equally if not more in regard to injury or damage which the rest of the members may suffer as a result of the election at the Muar level not being suspended or the elections at the general assembly being postponed.

In *Lee Liong Chan & Anor* v *Tan Sri Datuk Teh Ewe Lim & Anor*,[19] Edgar Joseph Jr J in refusing to grant an interlocutory injunction to restrain the defendants from holding the election of office bearers for a branch of the Parti Gerakan Rakyat Malaysia held, inter alia, that the balance of convenience favoured the defendants since the holding of fresh election procedures would necessarily entail much expense, time and effort. In this case not only will there be such wastage, but also all members of the association could be deleteriously affected in their political interest. The association is a political party and is claimed by the defendant to be a component party of the Barisan Nasional which, it is not disputed, is the governing political party in Malaysia. The defendant claims that the elections to be held at the general assembly of the association on 28 and 29 July 1990 will determine the leadership of the association and in this regard it would have a bearing on the nation's general election when held. It is not known when the nation's general election will be

held. It can be held at any time. The association, as a political party, must hold it in the interest of its members, all half million and more of them, to be in readiness with an up-to-date representation and leadership so as to be an effective component party ready to face the nation's general election. This has to be weighed against the individual aspirations of the plaintiffs at the divisional level in Muar. It would seem that the balance of convenience must come down heavily in favour of the defendant in his capacity as representative of all the members of the association save the plaintiffs. I take this view a fortiori since by virtue of art 167 it would appear that all party officials and office bearers elected or appointed under this constitution shall hold office until new party officials or office bearers have been validly elected or appointed to replace them in their respective offices. Pursuant to art 173.3, party officials are defined as members elected or appointed under art 20 which includes 27 central committee members. So it would seem that despite the suspension the status quo relative to the Muar divisional representation at the general assembly and the central committee will remain. However, I make no ruling on this point which may be taken up at a later stage.

It should have been known as far back as December 1989 that the general assembly election is to take place on 28 and 29 July. Under art 131 any member upon bona fide application is free to inspect the party divisional and branch registers. Under art 132 it is the responsibility of each branch secretariat to update annually and from time to time the addresses and other particulars of the members in the branch register and to further ensure that the relevant divisional secretariat and the party headquarters update their respective registers likewise. Thus it was up to each branch and division to keep their house in order, so to speak. Having failed to do so they should not be heard to complain or seek redress at the expense of other branches and divisions and the members generally. In fact no one has complained, except two members, the plaintiffs.

As to the first injunction sought, it is quia timet. I agree with counsel for the defendant that the plaintiffs' fear is purely speculative. There is no evidence of threatened wrong. The plaintiffs have not led evidence that disciplinary action will be taken or is likely to be taken and even if such action is taken there is nothing to suggest that the defendant will do so wrongly. The first plaintiff has merely affirmed that he honestly believes that the association will resort to harassment, intimidation and so on as abovestated. He has not stated the grounds of his belief as he is required to do under O 41 r 5(2). It is stated in 24 *Halsbury's Laws of England* (4th Ed) para 932 that a plaintiff complaining of threatened invasion of a legal right must establish not only that there is such a right but that that right has been infringed, that further infringement is threatened to a material extent and in respect of damage which the plaintiff has not suffered as yet, that it is likely to accrue within a reasonable time. A plaintiff has to show a strong probability that the apprehended mischief will in fact arise and must aver and prove a situation which is calculated to infringe a plaintiff's right. In *Fletcher* v *Bealey*[20] which was followed by Haidar J in *PPES Resorts Sdn Bhd* v *Keruntum Sdn Bhd*,[21] Pearson J laid down two ingredients for quia timet action. First, there must be proof of imminent danger, if no actual damage is proved and secondly, there must be proof that the apprehended damage will, if it comes, be very substantial. Nothing of the sort was proved in this case. In this regard see also the case of *Draper* v *British Optical Association*.[22] In *A-G for the Dominion Of Canada & Ors* v *Ritchie Contracting And Supply Co Ltd & Ors*,[23] Lord Dunedin in his speech in the Privy Council said at p 1005 that no one can obtain a quia timet order by merely saying 'timeo'. He must aver and prove that what is going on is calculated to infringe his rights. All that the first plaintiff has effectively said in purported support of the first injunction sought is 'timeo'. The second plaintiff has said nothing.

The second injunction sought is mandatory. It is only in very rare and in the most extreme circumstances that the court should interfere by way of mandatory injunction in the delicate mechanism of industrial dispute and industrial negotiations. So said Geoffrey Lane LJ in *Harold Stephen & Co Ltd & Ors* v *Post Office*[24] at p 944. In that case postal workers at a sub-post office decided to support a trade union in an industrial dispute by refusing to handle mail. The post office after due warning which was ignored suspended the workers without pay and the sub-post office was closed. This disrupted the plaintiff's business. So they brought an action against the post office seeking a mandatory injunction compelling the post office to provide services, contending that notwithstanding immunity from court proceedings conferred on the post office by legislation, the plaintiffs were entitled to bring an action in detinue requiring the post office to deliver up mail addressed to them and that accordingly they were entitled to the injunction sought. Lord Denning MR who presided in that case said the first point which sprang to mind was that in granting a mandatory injunction, the court ought to be able to tell the person, in that case the post office, exactly what it had to do in order to comply with it. For authority the learned Master of the Rolls referred to *Redland Bricks Ltd* v *Morris*[25] and posed this question: 'So if we grant an injunction in this case what are we to tell the post office to do?' Likewise in the present case. This court does not know the magnitude or extent of the problem in regard to phantom and other unauthorized persons in the membership register. The court does not know with any certainty what has to be done to resolve the problem. The court is not aware of the resources available to the defendant to tackle it with success nor is it known how long it will reasonably take to resolve the matter. In the circumstances there is no way that the court can supervise the effective working out of the mandatory injunction assuming it is given as prayed for by the plain-

tiffs. The dictum of Geoffrey Lane LJ in the above case was adopted by the Federal Court in *Sivaperuman* v *Heah Seok Yeong Realty Sdn Bhd.*[26] Prior thereto Abdoolcader J, as he then was, in *Wah Loong (Jelapang) Tin Mine Sdn Bhd* v *Chia Ngen Yiok*[27] at p 114 issued the same warning, namely, that a mandatory injunction is never granted before trial save in exceptional and extremely rare cases.

The plaintiffs in seeking the mandatory injunction wanted the defendant forthwith to take over the conduct of the divisional election and again forthwith to conduct such election to elect the 1990 divisional office bearers and national delegates to the annual general assembly. At the same time their counsel conceded that it would be wrong to carry out the Muar divisional elections with fictitious members on the register. Inasmuch as the plaintiffs were seeking the mandatory injunction, the onus was on them to demonstrate to the court by evidence that the injunction if granted was reasonably capable of being carried out, and forthwith at that, yet only after eradicating the problem of phantom and unlawful members. The plaintiffs produced no such evidence.

As to the alternative injunction sought, the decision to hold the election at the annual general assembly on 28 and 29 July is a decision which has not been challenged by the plaintiffs. Counsel for the plaintiffs expressly said so. Accordingly, the provisions of s 18C apply and it would seem that the court has no jurisdiction to deal with the matter in this regard. The plaintiffs however persist. They say that notwithstanding that validity of the decision is not questioned the election should be postponed. I do not see how the court can order so without flying in the face of the section.

At the eleventh hour and faced with the provisions of art 167, the plaintiffs applied to amend the summons seeking to restrain the association from preventing the plaintiffs and the duly elected 1987 national delegates from the Muar division from attending the annual general assembly of the association to be held on 28 and 29 July 1990 and to exercise their rights as national delegates at the general assembly and election. The application was opposed as coming too late. I agree. The application to amend is refused. But the plaintiffs should have leave to bring a fresh application if they deem fit and I order accordingly.

For the reasons abovestated the plaintiffs' interlocutory summons for injunctions is dismissed with costs to be taxed.

Applications dismissed.

Solicitors: *Yeoh Poh San & Co; Mah Kok & Din.*

Reported by *Zarinah Marican*

Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors

HIGH COURT (KUCHING) — SUIT NO KG 256 OF 1988
HAIDAR J
25 JUNE 1990

Civil Procedure — Representative action — Whether action fell within ambit of O 15 r 12(1) of the Rules of the High Court 1980 — Tests to be satisfied — Rules of the High Court 1980, O 15 r 12(1)

Limitation — Action taken against act of public officers — Limitation period 36 months next after act complained of — Act complained of occurred in 1951 — No attempt to enforce legal rights — No reasons given for delay in instituting action — Public Authorities Protection Act 1948, s 2

Civil Procedure — Pleadings — Statute of limitations pleaded as defence but defence not delivered — Defendants merely alleging no reasonable cause of action — Action to be struck out if claim time-barred

The plaintiffs are claiming on behalf of themselves and all other proprietors of native customary land, situated at Kampong Uma Bawang, Sarawak, that the third defendant wrongfully granted a timber licence to the second defendant for the taking of forest produce from portions of land which they claimed includes their native customary land.

The third defendant's predecessors had, in August 1951, issued a proclamation under s 29 of the then Forest Ordinance 1934 constituting the land enclosed within indicated boundaries a protected forest known as Lemiting Protected Forest ('LPF'), subject to the rights, privileges and special conditions governing the protection of the communities to farm their secondary forest ('temuda') as specified. The timber licence covers the forest area in the LPF which the defendants claim is state land. The defendants now apply to strike out the plaintiffs' action under O 18 r 19 of the Rules of the High Court 1980. The plaintiffs have applied to reamend their writ and statement of claim to fully indicate the representative action of the plaintiffs.

The court proceeded on two main issues:

(i) whether the action should or can proceed as a representative action;
(ii) whether the plaintiffs' claims for the declaratory orders are barred by limitation.

Held, allowing the defendants' applications:

(1) For an action to be properly constituted as a representative action under O 15 r 12(1) of the Rules of the High Court 1980, it must be shown that all the members of the alleged class have a common interest, that all have a common grievance and that the relief is in its nature beneficial to them all.

(2) In this case, the plaintiffs have filed the action as a representative of the Kayan community which is a native race specified in the schedule to the Interpretation Ordinance. Native customary rights are recognized by the Land Code of Sarawak (Cap 81) and under s 2 of the Code, if the native customary rights were established as at 1 January 1958, such rights shall subsist. The plaintiffs have therefore satisfied the test of common interest.

(3) The proclamation deprived the Kayans as a community of their alleged customary rights over the land proclaimed. Given the relevant provisions of the Land Code, if any member of the community can establish their native customary rights, then such rights are protected by law and if they can show an